
UTAH LABOR COMMISSION

JANET G. OBERSHAW,

Petitioner,

vs.

**WASHINGTON COUNTY
SCHOOL DISTRICT
and UTAH SCHOOL BOARDS
RISK MANAGEMENT MUTUAL
INSURANCE ASSOCIATION,**

Respondents.

**ORDER REVIEWING
ALJ'S DECISION**

ORDER OF REMAND

Case No. 04-0610

Janet G. Obershaw asks the Utah Labor Commission to review Administrative Law Judge Sessions' denial of Ms. Obershaw's claim for benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Ms. Obershaw claims workers' compensation benefits from Washington County School District and its insurance carrier, Utah School Board's Risk Management Mutual Insurance Association, (referred to jointly as "Washington County") for a work injury to her right leg that occurred on November 9, 1998. Washington County paid Ms. Obershaw benefits for the compensable work accident and her current claim, filed on June 28, 2004, seeks only permanent total disability compensation. Following an evidentiary hearing, Judge Sessions appointed a medical panel. After reviewing the panel's report, Judge Sessions concluded that Ms. Obershaw was not permanently and totally disabled and denied benefits.

In her motion for review, Ms. Obershaw argues that Judge Session's conclusions are contradictory to the parties' stipulation that Ms. Obershaw was permanently and totally disabled. She also argues that, regardless of the parties' stipulation, the evidence established that she was entitled to a preliminary finding for permanent total disability.

FINDINGS OF FACT

The Commission finds the following facts material to Ms. Obershaw's motion for review: Ms. Obershaw worked for Washington County as a part-time substitute teacher. On November 9, 1998, she tripped and fell while at work, causing multiple fractures in the tibia and fibula of her right

ORDER REVIEWING DECISION/REMAND
JANET G. OBERSHAW
PAGE 2 OF 5

leg, necessitating immediate surgery. She was 62 years old at the time. Ms. Obershaw reached medical stability from the accident by December 16, 1999, but was left with 15% whole person impairment. Her surgeon, Dr. Anderson, stated that the “ankle was never going to be totally normal.” Since the accident, Ms. Obershaw has not returned to work. In 1999, Obershaw was diagnosed with Parkinson’s disease, and in 2004, a probable seizure condition.

Her treating physician, Dr. Callahan, concluded that Ms. Obershaw’s impairments limit her ability to work. At Washington County’s request, Dr. Moress examined Ms. Obershaw and observed that she requires a cane to walk and has “gait disturbance.” Dr. Moress concluded that Ms. Obershaw has a combination of impairments “that would limit her ability to do basic work activities.” Mr. Dell Felix conducted a functional capacity evaluation of Ms. Obershaw. In his report, dated February 15, 2005, Mr. Felix concluded that, taking into account Ms. Obershaw’s physical and functional limitations, she met the sedentary work level classification. He also observed that “[h]er manual dexterity was very slow with both hands and she is only slightly limited from the tremors in her right hand from Parkinson’s disease.”

A review of the hearing record establishes that Washington County conceded Ms. Obershaw is permanently and totally disabled and agreed to this as a stipulation, although it continued to dispute whether the work accident is the direct cause of her disability. Additionally, Mr. Lister, a vocational expert, testified that taking into account Ms. Obershaw’s limitations, there is no other work reasonably available to her.

Following the hearing, Judge Sessions appointed a medical panel who reviewed the entire medical file and examined Ms. Obershaw. The panel stated:

Mrs. Obershaw’s greatest dysfunction appears to be as a sequela to her right tibia/fibula fractures. I agree with the assessment of Mr. Dale Felix in that she has a Sedentary limitation of work capacity. The comments of no standing more than 25 minutes, no walking continually for greater than 10 minutes, no activity demanding full movement and/or repetition of the right ankle/foot, no walking on uneven ground, climbing, or working on elevated structures should be respected. Mrs. Obershaw should not ambulate without a single point cane. A wheelchair should be used for extended ambulatory demands. There should be no lifting or carrying when in the standing or walking position I do not feel that Mrs. Obershaw’s Parkinsonian picture truly limits her work ability with the exception of her not being able to perform fine manipulation or rapid dexterous movements of her dominant right upper extremity.

DISCUSSION AND CONCLUSION OF LAW

It is not disputed that Ms. Obershaw suffered a compensable injury arising out of her work accident on November 9, 1998. The dispute to be resolved is whether Ms. Obershaw is entitled to

ORDER REVIEWING DECISION/REMAND
JANET G. OBERSHAW
PAGE 3 OF 5

permanent total disability compensation as a result of that work accident. Judge Sessions concluded that Ms. Obershaw was not permanently and totally disabled since her “sedentary” work classification purportedly showed she could work. Section 34A-2-413 of the Utah Workers’ Compensation Act (the “Act”) provides three elements that must be proven in order to establish entitlement to permanent total disability compensation.

First, Section 413(1)(b)(i) requires that “the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement.” The Commission finds that Ms. Obershaw sustained significant impairments as a result of the work accident, thus satisfying the first element.

The second element set forth in 413(1)(b)(ii) requires a finding that the employee is permanently and totally disabled. Section 413(1)(c) sets forth four elements that must be satisfied in order to prove that an employee is permanently totally disabled. These elements essentially require that Ms. Obershaw not be gainfully employed, that her impairment(s) limit her ability to do basic work activities, that her work-related injury prevents her from performing the essential functions of the work activities for which she was qualified up until the accident, and that she cannot perform other work reasonably available, taking into consideration her age, education, past work experience, and medical and residual functional capacity. The Commission finds that Ms. Obershaw satisfies the first three steps because the evidence shows she has not been gainfully employed since the time of the injury, she has a combination of impairments that limit her ability to do basic work activities, and she would not be able to perform the essential functions of her previous work activities.

The remaining element under 413(1)(c) for establishing an employee is permanently and totally disabled, requires that Ms. Obershaw cannot perform other work reasonably available. Judge Sessions found that the conclusions of the medical panel and Mr. Felix were that Ms. Obershaw has a sedentary limitation of work capacity, which proves in and of itself that Ms. Obershaw could perform other work reasonably available. The Commission disagrees with a finding that Ms. Obershaw’s functional capacities qualify her for work in the “sedentary” work level classification is the equivalent of finding that there was *actual work reasonably available* taking into consideration her age, education, past work experience, and medical and residual functional capacity. The testimony of the vocational expert was that there is *no* other work reasonably available that she could perform taking into account her impairments and resulting limitations. No evidence was provided to contradict this testimony or the evidence of Ms. Obershaw’s permanent total disability. The Commission finds that Ms. Obershaw has demonstrated she cannot perform other work reasonably available under the foregoing criteria. The Commission also notes that, at the hearing, there was a stipulation by the parties that Ms. Obershaw is permanently and totally disabled, although Washington County, without the benefit of the hearing record, disputes such a stipulation was entered. Nevertheless, even provided there was no evidence of such stipulation, the Commission finds Ms. Obershaw has satisfied the requirements set forth under 413(1)(c) for demonstrating that she is permanently and totally disabled.

ORDER REVIEWING DECISION/REMAND
JANET G. OBERSHAW
PAGE 4 OF 5

Returning to the statutory requirements set forth in Section 413(1)(b), the third and final element necessary under (b)(iii) for establishing entitlement to permanent total disability compensation, requires that Ms. Obershaw prove that her work accident is the “direct cause” of her permanent total disability. The medical panel concluded that, even though Ms. Obershaw had other impairments not related to her work accident, her greatest “dysfunction” was from the injuries sustained in the work accident. The panel did not feel that Ms. Obershaw’s Parkinson’s disease substantially impacted her ability to work. The Commission has reviewed the medical evidence and finds that the majority of Ms. Obershaw’s physical restrictions that leave her permanently and totally disabled, were directly caused by the injuries sustained in the November 9, 1998, work accident.

Based on the foregoing, the Commission concludes that Ms. Obershaw is entitled to a preliminary finding for permanent total disability. However, Section 413(6) of the Act provides that no such determination is final until an additional hearing is held to review reemployment activities and the employer/insurance carrier’s reemployment plan. This additional hearing has not been held on Ms. Obershaw’s claim, nor have the parties waived this hearing. Accordingly, the Commission will remand this matter to the Adjudication Division to conduct such additional proceedings. Pending the resolution of this issue, Section 413(6)(b) requires that Ms. Obershaw be paid subsistence compensation and the Commission will direct Washington County to immediately pay such benefits.

ORDER

Having concluded that Ms. Obershaw has established a preliminary claim for permanent total disability compensation pursuant to § 34A-2-413 of the Utah Workers’ Compensation Act, the Commission hereby enters its tentative finding for permanent total disability. Washington County is hereby ordered to immediately pay permanent total disability compensation to Ms. Obershaw at the rate of \$115.00 per week, as was stipulated to at the hearing, commencing December 16, 1999 (the date Ms. Obershaw reached medical stability), and continuing until further order. Washington County shall also pay interest at 8% per annum from the date that each such payment was due. In computing its present liability, Washington County may offset any disability compensation it has previously paid to Ms. Obershaw. The matter is hereby remanded to the Adjudication Division for a hearing, unless waived by the parties, regarding Ms. Obershaw’s rehabilitation and reemployment, and for award of attorney’s fees and costs. It is so ordered.

Dated this 30th day of May, 2008.

Sherrie Hayashi
Utah Labor Commissioner

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

ORDER REVIEWING DECISION/REMAND
JANET G. OBERSHAW
PAGE 5 OF 5

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.